



January 5, 2000

Ms. Janice Marie Wilson
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2000-0038

Dear Ms Wilson:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 131260.

The Texas Department of Transportation (the "department") received a request for plans for a section of highway on which a fatal car accident occurred. You assert that section 552.103 of the Government Code excepts from disclosure the requested information. We have considered the exception you claim and have reviewed the submitted information.

Section 552.103(a), amended by the Seventy-sixth Legislature, reads as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You submitted to this office a notice of claim letter, dated July 3, 1997, concerning an accident that occurred on May 2, 1997. In Open Records Decision No. 638 at 5 (1996), this office determined that a governmental body establishes that litigation is reasonably anticipated when it receives a notice of claim from an attorney and represents to this office that the notice complies with the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, or any applicable city statutes or ordinances. However, we note that a suit for personal injuries must generally be brought under the Texas Tort Claims Act within two years of the date the cause of action arose. *See* Civ. Prac. & Rem. Code § 16.003 (general two-year statute of limitations for personal injuries and wrongful death). Suits that are brought under the act and outside of the applicable statutory period can be dismissed. *Dalon v. City of DeSoto*, 852 S.W.2d 530 (Tex. App.—Dallas 1992, writ denied); *Bishop v. State*, 577 S.W.2d 377 (Tex. Civ. App.—El Paso 1979, no writ). Thus, the suit must have been brought by May 2, 1999 in order to comply with the statute of limitations.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). The accident that was the basis of the claim occurred more than two years ago without a lawsuit being filed against the department. Although it appears that litigation is pending concerning the accident, there is no indication that the department is a party to that litigation or anticipates being a party to that litigation. Because a suit was not filed within the two year statute of limitations, we conclude that, in this situation, the department has not met its burden of showing that it reasonably anticipated litigation under section 552.103(a) when the request was made on November 1, 1999. Thus, you must release the requested information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

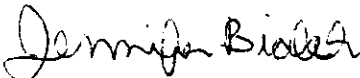
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/cwt

Ref: ID# 131260

Encl. Submitted documents

cc: Mr. Charles Pollard
Post Office Box 5163
Kingwood, Texas 77325
(w/o enclosures)